

# THE UNENUMERATED RIGHTS PROVISIONS IN THE U.S. AND ARGENTINE CONSTITUTIONS: DIFFERENT PATHS FROM A PURPORTEDLY SINGLE SOURCE

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## INTRODUCTION

In his popular book *Democracy and Distrust*, John Hart Ely described two competing views on constitutional adjudication: one holds that “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution”; the other urges that “courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.”<sup>1</sup> An extra layer to this debate is added when constitutional provisions that refer to “unenumerated rights” come into play.

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<sup>1</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (10th ed. 1980).

Some constitutions are guided by the approach that the absence of expressly stated rights must not be construed to deny other rights not explicitly delineated therein, thus granting unenumerated rights equal recognition and protection. At least formally, the U.S. Constitution takes this position. The Ninth Amendment led the way and has been the inspiration for similar provisions in Latin-American constitutions.<sup>2</sup>

The Constitution of Argentina contains an unenumerated rights provision—Article 33—borrowed from the Ninth Amendment to the U.S. Constitution. However, judicial treatment of these clauses varies significantly. While courts in the United States have seldomly drawn upon the Ninth Amendment, Argentine courts have consistently recognized substantive and procedural rights under Article 33.

References to the Ninth Amendment in decisions before the U.S. Supreme Court's ruling in *Griswold*<sup>3</sup> are scarce and trivial. Not even after this case—considered the most important one addressing the Ninth Amendment—did the provision become a sufficient basis for recognizing a right. Nor did the provision gain popularity among judges as a support of decisions reached on other grounds. Conversely, the use of Article 33 has been central to finding unenumerated substantive and procedural rights under the Argentine Constitution, such as those recognized by the Supreme Court of Argentina (*Corte Suprema de Justicia de la Nación*; hereinafter “CSJN”) in cases like *Kot* (writ of *amparo*)<sup>4</sup> or *Sejean* (right to remarry).<sup>5</sup>

A few reasons could explain the dissimilar attitudes American and Argentine judges have toward their respective unenumerated rights provisions. First, the natural law<sup>6</sup> roots of the common law tradition—responsible for adopting the Ninth Amendment—lost ground to a more positivist<sup>7</sup> approach during the late nineteenth century, and U.S. judges became reluctant to utilize open-ended sources like the unenumerated rights provision. Second, a strong cultural component in American constitutional law discourages interpretive practices perceived as “undemocratic” while encouraging rather conservative ones, which prevents Ninth

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<sup>2</sup> Héctor Gros Espiell, *Los derechos humanos no enunciados o no enumerados en el constitucionalismo americano y en el artículo 29.c) de la Convención Americana sobre Derechos Humanos*, 4 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL 145, 148 (2000).

<sup>3</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>4</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, “*Kot*, S. S.R.L. s/ recurso de hábeas corpus,” Fallos (1958-241-291) (Arg.); In the Argentine legal system, the writ of *amparo* is a procedural remedy that provides effective protection for rights other than physical liberty (which is exclusively protected through the writ of habeas corpus). It has been described as “a . . . suit of a summary nature roughly comparable to the Anglo-American writs of injunction and mandamus.” Thomas E. Roberts, *The Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina*, 31 OHIO ST. L. J. 831, 831 (1970).

<sup>5</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/11/1958, “*Sejean*, Juan Bautista c/ Zaks de Sejean, Ana María s/ inconstitucionalidad del art. 64 de la ley 2393,” Fallos (1986-308-2268) (Arg.).

<sup>6</sup> The concept of natural law has been the subject of numerous disputes. In its simpler form, “‘natural law’ is the understanding that there is a *universal morality naturally accessible to all rational people*.” ANDREW FORSYTH, *COMMON LAW AND NATURAL LAW IN AMERICA: FROM THE PURITANS TO THE LEGAL REALISTS* 103 (2019). The term is frequently used to describe approaches that view law as intrinsically linked to moral principles. *See id.*

<sup>7</sup> As opposed to natural law, “[l]egal positivism is [. . .] often defined, minimally, as the contention that law has no necessary connection with morality.” *Id.*

Amendment arguments from gaining traction. Third, legal practice in Argentina, though centered on codified rules, is perceived as a scientific discipline, and relies heavily on legal scholarship and general principles, which makes Argentine judges more willing to invoke open-ended sources such as Article 33. Fourth, unlike the United States, Argentina has a long-standing tradition of borrowing from other legal systems, so Article 33's open-endedness not only comes naturally to Argentine judges but also operates perfectly as a vehicle to "import" rights. Finally, although Article 33 shares much of the language of the Ninth Amendment, its wording suggests a different reading that facilitates (and even encourages) recognizing rights.

This article sheds light on why these two analogous constitutional provisions, one being the direct inspiration of the other, have not been given the same weight in their respective countries' case law. Part II deals with the origins of the unenumerated rights provision in the U.S. and Argentine constitutions. Parts III and IV explore through judicial decisions the different approaches to the unenumerated rights provision adopted in each country while outlining some features of the American and Argentine legal systems that could account for it. Part V offers a recap of the article and some closing thoughts.

## I. THE HISTORY OF THE UNENUMERATED RIGHTS PROVISIONS

### A. *The Ninth Amendment to the U.S. Constitution*

In 1787, delegates from the thirteen newly independent states were entrusted with proposing changes to the Articles of Confederation; instead, they proposed a Constitution that designed a new government.<sup>8</sup> Given their lack of authority for that enterprise, the Constitution had to be ratified, not by the Confederation Congress, but by the people themselves.<sup>9</sup> Special ratifying conventions were held throughout the states; debates in favor and against the Constitution raged for over a year in newspapers, taverns, and state legislatures.<sup>10</sup>

Those who opposed ratification came to be known as the "Antifederalists." Some of them rejected the Constitution altogether, while others tried to condition ratification on the prior enactment of a federal bill of rights.<sup>11</sup> They feared that the federal government would encroach on the people's natural rights, and declarations of rights had proven to be useful resources to limit abuses of power.<sup>12</sup>

The Federalists were reluctant to adopt a bill of rights for two main reasons. First, they deemed it unnecessary: the Constitution did

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<sup>8</sup> PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788* ix (2010).

<sup>9</sup> At least nine ratifications were needed to put the Constitution into effect.

<sup>10</sup> MAIER, *supra* note 8, at ix.

<sup>11</sup> Some pamphleteers, like the ones called "Federal Farmer" and "Brutus", wrote flyers in favor of this document at the federal level because bills of rights were already commonly found in state constitutions. KURT T. LASH, *THE LOST HISTORY OF THE NINTH AMENDMENT* 13 (2009).

<sup>12</sup> See, e.g., Brutus II (Nov. 1, 1787), *reprinted in* THE ANTI-FEDERALIST: AN ABRIDGMENT, BY MURRAY DRY, OF THE COMPLETE ANTI-FEDERALIST EDITED, WITH COMMENTARY AND NOTES, BY HERBERT J. STORING 117-22 (Herbert J. Storing ed., 1981).

not grant unlimited powers to the federal government.<sup>13</sup> People's rights were not at risk because Congress would not be able to, for example, censor the press, since that power was nowhere to be found in Article I.<sup>14</sup> Second—and perhaps most importantly—a bill of rights would be dangerous: any enumeration might be construed as a closed list of rights that denied the existence of *other* rights.<sup>15</sup>

The Antifederalists had the upper hand, and the debate leaned towards rejecting ratification. Even James Madison, who had never fought for amendments as essential protections of the rights of the American People,<sup>16</sup> hoped that such a “nauseous project” would “kill the opposition.”<sup>17</sup> He started arguing in favor of a series of amendments after ratification, which led to the Constitution being ratified by all but two states—North Carolina and Rhode Island—and coming into effect in 1789.

The Federalists won forty-eight of the fifty-nine seats in Congress in the first federal election,<sup>18</sup> and this overwhelming majority helped Madison submit to the House of Representatives a list of nine amendments to the Constitution. He had argued against them, but now that the Constitution was ratified, he thought they would “serve the double purpose of satisfying the minds of well-meaning opponents and of providing additional guards in favor of liberty.”<sup>19</sup> The House submitted Madison's proposal—and amendments proposed by states—to a committee composed of a representative from each state. Madison was one of its members. Since he had previously opposed a declaration of rights, he had to consider carefully the arguments against it. He claimed first that a bill of rights was needed because, even though the federal government's powers were enumerated, it also had discretionary powers that could be abused.<sup>20</sup> Second, as to the dangers of misconstruing a bill of rights as encompassing an exhaustive list of rights, he proposed the following amendment:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>21</sup>

The House of Representatives agreed to a list of seventeen amendments, and the Senate passed twelve of them.<sup>22</sup> Only

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<sup>13</sup> Randy E. Barnett, *Introduction: Implementing the Ninth Amendment*, in 2 THE RIGHTS RETAINED BY THE PEOPLE 6, 7 (Randy E. Barnett ed., 1993).

<sup>14</sup> For James Iredell, for example, a bill of rights made sense in countries with unwritten Constitutions, that is, they were simply an English institution. But they would not be necessary in the United States; the people expressly declared in the Constitution the amount and extent of the power they gave to the federal government. People simply retained all the power not expressly handed away to a central authority. MAIER, *supra* note 8, at 418.

<sup>15</sup> James Wilson deemed the idea of a declaration “absurd”: “If we attempt an enumeration [of rights], everything that is not enumerated is presumed to be given [to the authorities].” *Id.* at 108.

<sup>16</sup> Madison had written extensively to counter these arguments, emphasizing that such dangers were not realistic because Congress' powers were very limited. *Id.* at 455.

<sup>17</sup> *Id.* at 455-56.

<sup>18</sup> *Id.* at 433.

<sup>19</sup> *Id.* at 441.

<sup>20</sup> *Id.* at 451.

<sup>21</sup> Barnett, *supra* note 13, at 8.

<sup>22</sup> MAIER, *supra* note 8, at 454-55.

amendments numbered three through twelve ended up being ratified, and the debate over the necessity and dangers of a bill of rights was finally settled with the last two amendments. The Ninth Amendment states that “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” In contrast, the Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

### ***B. Article 33 of the Argentine Constitution***

Argentina’s constitutional history is tainted with violence, chaos, and dictators. For more than thirty years after independence from Spain in 1816, the country tried—unsuccessfully—to unite the provinces of the former Viceroyalty of the Río de la Plata into a single federal government. Two somewhat liberal constitutions (1819 and 1826) were rejected due to their “unitarian” tendency (they created a centralized government located in Buenos Aires).<sup>23</sup> “Unitarians” thought the country should be ruled by members of Buenos Aires’ elite, whereas “federalists” who were rural *caudillos* (warlords), wished to maintain their autonomy.<sup>24</sup> For over a decade, wars between unitarians and federalists made constitutional agreements impossible. In 1829, the debate was violently settled when Juan Manuel de Rosas, a federalist, established a dictatorship in the Province of Buenos Aires that lasted until 1852.<sup>25</sup>

For over twenty years, Rosas’ political opponents were either executed or forced into exile, and soon, a liberal generation of intellectuals started planning, from abroad, a more federal national government that could gain support from the provinces.<sup>26</sup> When Rosas was defeated in February 1852 by another *caudillo*, Justo José de Urquiza, from the Province of Entre Ríos, the time finally came for a constitutional convention.<sup>27</sup>

Unlike the American colonies, the Río de la Plata region never had liberal governmental institutions. Spanish rule left no room for self-government, and three hundred years of colonial authority deeply rooted in the legal culture were not easy to dismiss.<sup>28</sup> The drafters of the Argentine Constitution sought to create a liberal government for the first time while eliminating colonial approaches. A group of liberal thinkers led by Juan Bautista Alberdi and Domingo Faustino Sarmiento thoroughly studied the U.S. Constitution, and their writings shaped the work of the National Convention.<sup>29</sup>

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<sup>23</sup> See MANUEL JOSÉ GARCÍA-MANSILLA & RICARDO RAMÍREZ CALVO, *LAS FUENTES DE LA CONSTITUCIÓN NACIONAL: LOS PRINCIPIOS FUNDAMENTALES DEL DERECHO PÚBLICO ARGENTINO* 70-72 (2006).

<sup>24</sup> DAVID ROCK, *ARGENTINA 1516-1987: FROM SPANISH COLONIZATION TO ALFONSIN* 79-80 (rev. exp. ed. 1987).

<sup>25</sup> *Id.* at 103-04.

<sup>26</sup> *Id.* at 114.

<sup>27</sup> *Id.* at 120.

<sup>28</sup> See Jonathan Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1483, 1499-1500 (1997).

<sup>29</sup> *Las bases y puntos de partida para la organización política de la República Argentina*, written by Alberdi in 1852, is considered the fundamental text of Argentine constitutionalism. See GARCÍA-MANSILLA & RAMÍREZ CALVO, *supra* note

One of the drafters, José Benjamín Gorostiaga, indicated that the document was “cast in the mold of the Constitution of the United States, the only model of a true federation which exists in the world.”<sup>30</sup> The Madisonian influence in the Convention was profound. Its members suggested incorporating key aspects of American constitutionalism: federalism, separation of powers (with checks and balances), a government of limited and enumerated powers, and a bill of rights.<sup>31</sup> All four ended up in the Constitution of the Argentine Confederation, which was enacted in 1853.<sup>32</sup>

However, Buenos Aires had refrained from sending delegates to the Convention and thus remained a separate sovereign entity until 1860. When it finally agreed to join the Confederation, Sarmiento, on behalf of the province, strongly argued in favor of a series of reforms to the text of the 1853 Constitution to make it even more similar to that of the U.S. Constitution.<sup>33</sup> An Examining Committee to propose said amendments was appointed by the province. Sarmiento was one of its members, so, unsurprisingly, the body accorded great deference to the U.S. constitutional experience.<sup>34</sup> The Committee treated the U.S. Constitution as natural law and disregarded Argentine practices in public law.<sup>35</sup> Dalmacio Vélez Sarsfield, another Committee member, criticized the 1853 Constitution because its drafters “did not

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23, at 31-55 (discussing the importance of Alberdi’s writings and the influence of American constitutionalism on the Alberdian vision). See *infra* note 33 for a comment on Sarmiento’s most influential work.

<sup>30</sup> Miller, *supra* note 28, at 1515 (statement of José Benjamín Gorostiaga at the Congreso General Constituyente de la Confederación Argentina, Session of Apr. 20, 1853) (quoting 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS 1813-1893 (Emilio Ravignani ed., 1937), at 468).

<sup>31</sup> GARCÍA-MANSILLA & RAMÍREZ CALVO, *supra* note 23, at 16.

<sup>32</sup> This document, unlike the U.S. Constitution, did not require ratification from the provincial legislatures to come into effect. In 1852, representatives from thirteen of the fourteen provinces that constituted the Argentine Confederation signed and ratified the San Nicolás Agreement, which laid the foundations of the national organization of Argentina and served as a precedent for the 1853 Constitution. Article 12 of the agreement stated that after the Constitutional Convention had approved the text of the Constitution, the person in charge of the Confederation’s foreign affairs would immediately promulgate and enforce it as the Law of the Nation. Acuerdo celebrado entre los gobernadores de las Provincias Argentinas en San Nicolás de los Arroyos, el 31 de mayo de 1852, in LAS CONSTITUCIONES DE LA REPÚBLICA ARGENTINA 399-407 (Faustino J. Legón & Samuel W. Medrano eds., 1953). The Province of Buenos Aires was a signatory to the San Nicolás Agreement but never ratified it due to a series of confrontations that ended up with its secession from the Confederation, which lasted until 1861. See ROCK, *supra* note 24, at 121.

<sup>33</sup> The same year the 1853 Constitution came into effect, Sarmiento published *Comentarios de la Constitución de la Confederación Argentina*. There, he strongly suggested that, given the American influence on the specific wording used in the Argentine Constitution, its method of interpretation had to be precisely that of U.S. constitutional law; the work of American commentators and U.S. Supreme Court precedents had to be binding if the Argentine Constitution were to be interpreted correctly. Domingo Faustino Sarmiento, *Comentarios de la Constitución de la Confederación Argentina* [sic], con numerosos documentos ilustrativos del texto 8 (1st ed. 1853). He further argued that “it would be monstrous, if not to say ridiculous, to pretend that the same ideas, expressed with the same words, for the same ends, might produce different results in our Constitution or have a different meaning.” *Id.* at 9-10.

<sup>34</sup> See Convención del Estado de Buenos Aires, Informe de la Comisión Examinadora de la Constitución Federal, Session of Apr. 26, 1860, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS 1813-1893 (Emilio Ravignani ed., 1937), at 769, quoted in Miller, *supra* note 28, at 1524 (“[T]he criteria of the provincial convention in formulating its reforms has been the science and the experience of the analogous or similar Constitution which is recognized as most perfect,—that of the United States—because it is the most applicable and is the standard of the Constitution of the Confederation.”).

<sup>35</sup> Miller, *supra* note 28, at 1524-25.

respect [the U.S. Constitution's] sacred text, and an ignorant hand made deletions or alterations of great importance, pretending to improve it."<sup>36</sup> One of those "deletions of great importance" was the Ninth Amendment. According to Vélez Sarsfield, the lack of this clause demonstrated only that "those who deleted it knew less than those who made that great Constitution."<sup>37</sup>

In 1860, the Constitution was revised, and, among other modifications, an unenumerated rights provision, Article 33, was incorporated.<sup>38</sup> Its text reads: "The declarations, rights, and guarantees which the Constitution enumerates shall not be construed as a denial of other rights and guarantees not enumerated, but which issue from the principle of sovereignty of the people and from the republican form of government."<sup>39</sup>

## II. THE NINTH AMENDMENT: A DIRECT SOURCE OF NATURAL LAW RIGHTS

The question as to what type of rights are those that cannot be found within the four corners of the U.S. Constitution has received completely different answers. Some scholars have argued that the Ninth Amendment simply refers to a "collective right" of the People to alter or abolish government through means other than the amendment mechanism in Article V, that is, by holding a constitutional convention.<sup>40</sup> Others have suggested that its purpose was not to protect rights found outside the constitutional text, but "residual" rights in it, meaning those that could be discerned by virtue of the limited powers scheme put into place.<sup>41</sup> But the most persuasive reading of the Ninth Amendment is that the Founders firmly believed in natural law, and were thus pointing to rights the People already had regardless of what any positive law could possibly enumerate or declare. Simply put, "the unenumerated (natural) rights that people possessed prior to the formation of government, and which they retain afterwards, should be treated in the same manner as those (natural) rights that were enumerated in the Bill of Rights."<sup>42</sup>

This last interpretation can be read through some of the cases in early American history. In *Calder v. Bull* (1798), for example, Justice Chase considered the appropriate role of natural law in constitutional interpretation.<sup>43</sup> He argued that "the purposes for which men enter

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<sup>36</sup> Convención del Estado de Buenos Aires, Informe de la Comisión Examinadora de la Constitución Federal, Session of Apr. 26, 1860, in 4 ASAMBLEAS CONSTITUYENTES ARGENTINAS 1813-1893 (Emilio Ravignani ed., 1937), at 791 (statement of Dalmacio Vélez Sarsfield), quoted in Miller, *supra* note 28, at 1525.

<sup>37</sup> *Id.*

<sup>38</sup> Miller, *supra* note 28, at 1530.

<sup>39</sup> Art. 33, Constitución Nacional [Const. Nac.] (Arg.).

<sup>40</sup> AKHIL REED AMAR, THE BILL OF RIGHTS. CREATION AND RECONSTRUCTION 120 (1998). In fact, Amar suggests that to see the amendment as a "palladium of counter-majoritarian individual rights—like privacy—is to engage in anachronism." *Id.*

<sup>41</sup> Thomas B. McAfee, *The Bill of Rights, Social Contract Theory, and the Rights "Retained" by the People*, in 2 THE RIGHTS RETAINED BY THE PEOPLE 271, 272-73 (Randy E. Barnett ed., 1993).

<sup>42</sup> Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 1 (2006).

<sup>43</sup> *Calder et Wife v. Bull et Wife*, 3 U.S. 386 (1798). This Supreme Court case concerned a Connecticut law that ordered a new trial in a will contest, setting aside a judicial decree that had denied inheritance. Justices Chase and Iredell, while agreeing

into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it.”<sup>44</sup> He added that “[an] act of the legislature (for I cannot call it a law), contrary to the great first principles in the social compact, cannot be considered a rightful exercise of legislative authority.”<sup>45</sup>

Years later, in *Fletcher v. Peck* (1810), the Supreme Court held that a Georgia law that had rescinded a grant of land conveyed to innocent owners was unconstitutional and did so relying partly on natural law principles.<sup>46</sup> Chief Justice John Marshall indicated that legislative power is limited not only by “the words of the constitution,” but also by “the general principles of our political institutions.”<sup>47</sup>

This idea that rights were ultimately grounded in natural law was also present in how common-law rights were adjudicated at the time. An early example of this can be found in an 1823 Pennsylvania Circuit Court case, *Corfield v. Coryell*, in which a vessel was seized, condemned, and sold for violating a New Jersey law that prohibited taking oysters from a river.<sup>48</sup> In finding that the law had infringed the Privileges and Immunities Clause of Article IV of the Constitution, the court defined these privileges and immunities as those which are “in their nature, fundamental; which belong, of right, to the citizens of all free government; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.”<sup>49</sup> The court cited as examples, among others, the right to acquire, possess, and dispose of property; to pursue and obtain happiness and safety; to pass through or to reside in any other state; and to institute and maintain actions of any kind in the courts of the state.<sup>50</sup> Certainly, attributes of property and the pursuit of happiness and safety would have been basic common law concepts.<sup>51</sup> Why, then, has the Ninth Amendment been rarely invoked in constitutional jurisprudence? One answer lies in the drastic transformation of legal practice that took place in the U.S. during the late nineteenth century when the natural law roots of the common law were abandoned in favor of a

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that the statute did not amount to an ex post facto law, disagreed over the appropriate weight natural law had in constitutional interpretation.

<sup>44</sup> *Id.* at 388.

<sup>45</sup> *Id.* As examples of legislative acts contrary to those “great first principles” and thus not enforceable, he mentioned “a law that punishe[s] a citizen for an innocent action . . . ; a law that destroys, or impairs, the lawful private contract of citizens; a law that makes a man a Judge in his own cause; or a law that takes property from [one] and gives it to [another]”. *Id.*

<sup>46</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW. PRINCIPLES AND POLICIES 907 (5<sup>th</sup> ed. 1995).

<sup>47</sup> *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

<sup>48</sup> *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 551-52.

<sup>51</sup> Blackstone considered that natural law—which he defined as those laws “that existed in the nature of things antecedent of any positive precept”—and “the happiness of each individual” were “inseparably interwoven”. William Blackstone, Commentaries \*40. He viewed the rule “that [a] man should pursue his own true and substantial happiness” as the “foundation” of natural law. *Id.* at \*41. Blackstone also identified “the right of personal security, the right of personal liberty; and the right of private property,” *id.* at \*129, as “absolute rights” i.e. those rights “vested in [individuals] by the immutable laws of nature,” *id.* at \*124.



more positivist approach.<sup>52</sup> Another answer has to do with the ramifications of American “constitutionalism [being] a matter of political identity.”<sup>53</sup>

### A. Legal Positivism Takes the Lead

Legal positivism was formulated in the eighteenth and nineteenth centuries by Jeremy Bentham and John Austin as a reaction to William Blackstone’s theory of the common law, particularly his belief that its authority derived from natural law.<sup>54</sup> Both thinkers “insisted on the need to distinguish . . . law as it is from law as it ought to be.”<sup>55</sup> Their philosophy rested on the principle of separation between law and morals.<sup>56</sup>

Bentham and Austin’s ideas made their way to the United States after the Civil War, where they gained popularity.<sup>57</sup> Americans developed their implications along two lines: one line, called “analytical” jurisprudence, “emphasized the importance of clarifying legal concepts and categories, and sought to organize doctrine into ordered sets of internally consistent principles.”<sup>58</sup> The other line, known as “pragmatic” jurisprudence, rejected the abstractness of the analytical approach and “argued that law was an evolving human phenomenon that could be understood only contextually and empirically.”<sup>59</sup> Christopher Columbus Langdell was the leading proponent of the former, while Oliver Wendell Holmes Jr. was the main exponent of the latter.

Langdell, who was appointed Dean of Harvard Law School in 1870, forever changed American legal education by introducing the case method of study that replaced traditional textbook lectures on broad topics of the law. The case method was “a representation of, and the means to create and support” Langdell’s concept of law.<sup>60</sup> He thought of law as a science akin to geometry, consisting of principles or doctrines.<sup>61</sup> Like geometric principles, “[t]he law was to be discovered and extracted from its [sole] source [(rulings)] . . . by *induction*.”<sup>62</sup> Law students had to infer legal principles from the study

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<sup>52</sup> See FORSYTH, *supra* note 6, at 103 (“As American common law was worked out in the . . . nineteenth century, natural law was subsumed into its details; except in rare circumstances – notably in the arena of international law – common law less frequently appealed to natural law, for judges and jurists could now turn to the developing body of principles and precedents constitutive of American common law.”).

<sup>53</sup> Paul Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 198, 206 (Michael Ignatieff ed., 2005).

<sup>54</sup> Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2062-63 (1995).

<sup>55</sup> H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1958).

<sup>56</sup> Austin formulated this thesis in the following terms: “The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not found positive conformable to an assumed standard, is a different enquiry.” JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 157 (1995).

<sup>57</sup> See Edward A. Purcell Jr., *Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History*, 66 FLA. L. REV. 1457, 1466 (2015).

<sup>58</sup> *Id.* at 1472.

<sup>59</sup> *Id.*

<sup>60</sup> FORSYTH, *supra* note 6, at 110.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 111.

of courts' decisions found in reported cases, "thereby developing their own analytical powers,"<sup>63</sup> but it was the identification of those principles that mattered, not their explanation or justification.<sup>64</sup> So, where early nineteenth-century jurists would have resorted to natural law considerations, Langdellian-trained practitioners appealed to precedents; only the "historical determinations of judges provided the material of the law, and not human nature or philosophical reflection thereon."<sup>65</sup>

The Langdellian model of legal education fostered a different understanding of the grounding of the U.S. legal system. By focusing entirely on what was "contained in printed books"<sup>66</sup> and thus discouraging wide-ranging investigations of questions beyond the law,<sup>67</sup> "Langdell's science of the law – known and perpetuated in the case method – helped to displace natural-law forms of thinking about the law."<sup>68</sup> In legal discourse, common law rights were no longer grounded in natural law, but rather in a body of doctrine that emerged from prior judicial decisions, systematically studied, and from which legal principles could be coherently deduced.<sup>69</sup>

Langdell's approach contributed to "natural law los[ing] its hold on the common assumptions of most lawyers,"<sup>70</sup> but it was the Holmesian vision that profoundly shaped American law and marked its definitive break with natural law. Skeptical about the supposedly scientific basis of Langdell's ideas, Holmes believed that law was just what the courts did and that the task of lawyers was, therefore, to predict judicial decisions, not to determine right answers.<sup>71</sup> While the case method may have left no place for natural law in legal reasoning, Holmes denied its existence altogether. He criticized natural law jurists for "reading their personal values" into the law<sup>72</sup> and turning them into universal standards.<sup>73</sup> Instead, he claimed, law "should correspond with the actual feelings and demands of the community, whether right or wrong."<sup>74</sup> Holmes' approach was pragmatic: the law could not be axiomatically induced from precedents; its substance had much to do with what society understood to be convenient at a particular time.<sup>75</sup> In his own words: "the life of the law has not been logic: it has been experience."<sup>76</sup>

Holmes preached his moral skepticism not only as a legal scholar, but also from the bench. He argued that once natural law is

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<sup>63</sup> Ralph Michael Stein, *The Path of Legal Education from Edward I to Langdell: A History of Insular Reaction*, 57 CHI.-KENT L. REV. 429, 449 (1981).

<sup>64</sup> FORSYTH, *supra* note 6, at 122.

<sup>65</sup> *Id.*

<sup>66</sup> BRUCE A. KIMBALL, THE INCEPTION OF MODERN PROFESSIONAL EDUCATION. C. C. LANGDELL, 1826-1906 350 (2009).

<sup>67</sup> Stein, *supra* note 63, at 454.

<sup>68</sup> FORSYTH, *supra* note 6, at 121.

<sup>69</sup> See PAUL W. KAHN, LEGITIMACY AND HISTORY. SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY 110 (1993).

<sup>70</sup> Richard. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, 9 UNIV. PA. J. CONS. L. 401, 402 (2007).

<sup>71</sup> FORSYTH, *supra* note 6, at 126-27.

<sup>72</sup> Purcell, *supra* note 57, at 1498.

<sup>73</sup> See Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918)

("The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.")

<sup>74</sup> OLIVER WENDELL HOLMES JR., THE COMMON LAW 41 (Little Brown and Company, 1951) (1881).

<sup>75</sup> *Id.* at 1-2.

<sup>76</sup> *Id.* at 1.

taken out of the picture (because there is no such thing, actually), and “scientific” legal reasoning attacked as a farce, all that is left for judges to do is apply whatever society had set forth as the law. Holmes became wary of the counter-majoritarian tension that grew each time judges invalidated statutes for an alleged normative conflict with higher principles of law grounded in whichever source. This caution, as exercised in his famous dissent in *Lochner v. New York*,<sup>77</sup> led him to argue in favor of a rather radical democratic deference.<sup>78</sup>

It is no surprise that Holmes’ jurisprudence ended up being the perfect vehicle for early twentieth-century progressives to insist on social and economic reform and governmental regulation.<sup>79</sup> Their faith in legislatures resonated with Holmes’ deference to the will of the majority and his attack on natural law and “scientific” legal reasoning (on which conservative judges of the time relied to strike down progressive legislation).<sup>80</sup> In fact, “the use of positivist ideas . . . [against] the judiciary became habitual and reflected a fundamental change in American law and governance since the Civil War.”<sup>81</sup>

Both Langdell’s approach and Holmes’ theory “exclude[d] the broader normative principles that common law courts had traditionally invoked . . .”<sup>82</sup> With natural law forever displaced from the American legal system, the possibilities of developing Ninth Amendment jurisprudence vanished. In a framework where courts are to decide cases based on rules established by precedents and “without appeal[ing] to special claims of justice” or “higher-order” justifications,<sup>83</sup> there is no room for an open-ended provision that brings natural rights to the table.

Positivism has made the practice of law in the United States extremely “legalistic”: litigants and judges resort to “pre-existing rules and doctrines—purified by Langdell or reduced by Holmes—to make the legal system predictable, consistent, and knowable.”<sup>84</sup> Neither dare to make a Ninth Amendment case. Of course, they may still believe that natural law exists, or even that it demands a certain outcome as a matter of universal justice, but courtrooms are no longer an appropriate place for discussing these issues.<sup>85</sup> As of the late nineteenth century, litigation tools are limited to “human-made sources of law,” irrespective of personal religious or philosophical convictions.<sup>86</sup>

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<sup>77</sup> See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (J. Holmes, dissenting) (“I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law.”).

<sup>78</sup> See I HOLMES-LASKI LETTERS 249 (M. Howe ed. 1953) (“If my fellow citizens want to go to Hell I will help them. It’s my job.”).

<sup>79</sup> See Purcell, *supra* note 57, at 1475-77.

<sup>80</sup> See *id.* at 1498.

<sup>81</sup> *Id.* at 1500-01.

<sup>82</sup> Patrick J. Kelley, *Holmes, Langdell and Formalism*, 15 *RATIO JURIS* 26, 29 (2002).

<sup>83</sup> *Id.* at 48.

<sup>84</sup> *Id.* at 49.

<sup>85</sup> STUART BANNER, *THE DECLINE OF NATURAL LAW: HOW AMERICAN LAWYERS ONCE USED NATURAL LAW AND WHY THEY STOPPED* 5 (2021).

<sup>86</sup> See *id.* at 1 (“In 1850, when a lawyer spoke in court, it would have been entirely normal for the lawyer to discuss the law of nature alongside statutes and court decisions as acknowledged sources of law. Today, if a lawyer tries to discuss natural law in court, the judge will look puzzled, and opposing counsel will start planning the victory party. Natural law is no longer a part of a lawyer’s toolkit.”).

Contrary to Argentina's civil law tradition—as I will argue in Part IV(a)—the American positivist common law approach forces practitioners to deal with novel cases by exclusively relying on (and drawing from) precedents. Invoking abstract, vague, immutable principles of justice is neither necessary nor encouraged. Even when dealing with a constitutional issue, lawyers and judges only use Supreme Court precedents to derive constitutional principles to be applied in cases not covered by the text of the Constitution. As David Strauss put it, “there are settled principles of constitutional law that are difficult to square with the language of the document, and many other settled principles that are plainly inconsistent with the original understandings.”<sup>87</sup> The Constitution is interpreted not only by reading its text but by “[relying] on the elaborate body of law that has developed, mostly through judicial decisions, over the years.”<sup>88</sup> Cases not within the four corners of the Constitution are argued and adjudicated from principles that prior rulings have elaborated from its textual provisions. For example, instead of arguing that there is a natural right to burn the American flag, once the Supreme Court has reached a principled decision in which some conduct is recognized as an expression of thought or ideas,<sup>89</sup> litigants and courts claim that flag burning—which the Constitution does not explicitly protect—falls within the scope of the First Amendment.<sup>90</sup> There is no need to rely on the Ninth Amendment (and conjure natural law); an enumerated right (free speech) shaped by precedents provides a solid grounding.

Once we understand the Ninth Amendment as a direct and natural law-inspired source from which rights can be drawn, then the reluctance of lawyers and judges to employ it as an argument in cases not covered by other constitutional provisions seems easier to comprehend. A rare exception to this approach can be found in *Griswold*. Justice Goldberg's concurring opinion is a bold attempt to give teeth to the Ninth Amendment. By recognizing the right to marital privacy (in relation to the use of contraceptives) under the unenumerated rights provision, he invited the Court to rethink the Ninth Amendment as a tool for finding fundamental rights without having to ground them in specific amendments.<sup>91</sup>

### ***B. The Fixation with “We the People”***

With the positivist reshaping of the American legal system that occurred in the late nineteenth century, it is possible to argue that conservative theories of interpretation have pushed the Ninth

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<sup>87</sup> David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877 (1996).

<sup>88</sup> *Id.*

<sup>89</sup> See *Stromberg v. People of State of Cal.*, 283 U.S. 359, 369-70 (1931). The Supreme Court struck down as a First Amendment violation a California law that prohibited the display of a red flag as a symbol of opposition to government. The conduct at issue was considered a form of expression constitutionally protected.

<sup>90</sup> See *Texas v. Johnson*, 491 U.S. 397, 404-06 (1989). Johnson was convicted of desecration for burning the American flag. The Supreme Court found that such an action intended to convey a particularized message (disagreement with Ronald Reagan's renomination as President) which was “overwhelmingly apparent,” and thus considered it “expressive conduct” protected by the First Amendment. *Stromberg v. People of State of Cal.* was enough to justify the existence of the right to burn the American flag as part of the constitutional framework.

<sup>91</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486-95 (1965) (Goldberg, J., concurring).

Amendment even further away from Justice Goldberg's proposed reading. Consider Robert Bork's defense of originalism during his testimony before the Senate in 1987. When asked about why the Ninth Amendment had little to no useful application, he answered the following:

I do not think you can use the ninth amendment unless you know something of what it means. For example, if you had an amendment that says 'Congress shall make no' and then there is an ink blot and you cannot read the rest of it and that is the only copy you have, I do not think the court can make up what might be under the ink blot.<sup>92</sup>

Originalism has tried—rather successfully—to put the final nail in this amendment's coffin. Its animosity towards the mere idea of unenumerated rights comes from a more general theory of the role of the judiciary and the nature of the Constitution. It identifies the Constitution with what it was understood to mean by those who ratified it; to abandon the original understanding is to abandon the Constitution itself and to engage in political judging.<sup>93</sup> Judges, originalists claim, ought not to engage in value judgments but merely apply the self-interpreting constitutional text.<sup>94</sup> Such an open-ended provision like the Ninth Amendment would simply be too dangerous; judges might read into it whichever right they think would better serve the law, the country, or society. For Bork—as for many originalists—“adherence to the original understanding is justified because the abandonment of that understanding will lead judges to make ‘moral choices’ they have not been authorized to make.”<sup>95</sup>

Conservative theories of constitutional interpretation stress a belief that already permeates constitutional discourse in the United States: law is the product of a deliberate choice made by the popular sovereign (“We the People”). This does not necessarily require that the meaning of the Constitution is fixed forever at the time each provision was enacted, as originalism suggests,<sup>96</sup> but only that it locates the ultimate source of authority in a democratic foundational act.<sup>97</sup> There is maybe room for legal development as societies evolve, but the law's application to new circumstances is never seen as an act of judge-made law, but rather as demanded by the law itself in the first place. This makes it very difficult for arguments about unenumerated rights to prosper in court. The American way of doing constitutional law is more consistent with a claim that an already enumerated right—thought of by the Framers and enacted by “We the People”—has a bigger scope than it was originally thought to have, than with a claim for a novel right lacking textual support.

Believing that law results from collective self-authorship that has also prevented the success of other types of arguments: those that explicitly rely on foreign or international law. What courts from

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<sup>92</sup> Robert H. Bork, *of the District of Columbia, to be an Associate Justice of the Supreme Court of the United States, vice Lewis F. Powell, Jr., retired: Hearing Before the S. Comm. on the Judiciary*, 100<sup>th</sup> Cong. 249 (1987) (testimony of Robert H. Bork).

<sup>93</sup> Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 206 (1991).

<sup>94</sup> *Id.* at 215.

<sup>95</sup> *Id.* at 213.

<sup>96</sup> Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B. U. L. REV. 1953, 1958 (2021).

<sup>97</sup> See generally Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677 (2003).

abroad have done in the past or the consensus that has been reached by the international community, although of great importance to comparative law scholars, has limited relevance in American judicial decision-making.<sup>98</sup> Self-sufficiency is a distinctive feature of the U.S. legal system; “American judges are resistant to using foreign . . . [or international] precedents to guide them in their domestic opinions.”<sup>99</sup> U.S. courts base their legitimacy on the claim that their opinions express the will of the popular sovereign, not universal reason as reflected by comparative and international practice.<sup>100</sup> American constitutional discourse turns heavily toward “the Framers, original intent, and the historical artifact of the text” while “[rejecting] . . . natural law, legal science, and claims of universal rights.”<sup>101</sup>

The lack of Ninth Amendment jurisprudence is, therefore, hardly surprising. While foreign courts might willfully engage in transnational dialogues, drawing from collective experience to recognize unenumerated rights or expand the scope of enumerated rights under their respective legal orders,<sup>102</sup> sources that are

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<sup>98</sup> This does not mean that there are no decisions by U.S. courts invoking comparative or international practice. Even the Supreme Court has used it as persuasive authority in the central constitutional areas of cruel and unusual punishment, and due process. For example, in *Roper*, the Court held the juvenile death penalty unconstitutional under the Eighth Amendment. In determining the content of “evolving standards of decency” that guide what constitutes “cruel and unusual punishment,” the Court relied on the contemporary national consensus confirmed by global affirmations. See *Roper v. Simmons*, 543 U.S. 551, 575-578 (2005). In *Lawrence*, the Court held unconstitutional the criminalization of same-sex relations between consenting adults under the Due Process Clause of the Fourteenth Amendment. The Court turned to English law and the decision of the European Court of Human Rights in *Dudgeon v. United Kingdom* to overrule a constitutional precedent. See *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003). However, these two areas are “exceptional areas, and neither are developed primarily with reference to international human rights.” Jonathan Miller, *The Influence of Human Rights and Basic Rights in Private Law in the United States*, 62 AM. J. COMP. L. 133, 147 (2014). The truth is that the U.S. Supreme Court and lower courts have been much less inclined to look into these sources to aid them in their own deliberative process than courts of other countries.

<sup>99</sup> Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 8 (Michael Ignatieff ed., 2005).

<sup>100</sup> Justice Scalia embodies—to an extreme degree—this approach. During a famous televised conversation with Justice Breyer on the constitutional relevance of foreign court decisions, Justice Scalia was asked the following question: “if our courts look at another country’s courts and they’re able to find opinions that are persuasive on the merits, why couldn’t that be a way of informing our judges in a positive way?” His response is illustrative of U.S. courts’ historical tendency to ignore foreign or international law: “. . . your question assumes that it is up to the judge to find THE correct answer. And I deny that. I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that’s what it says, that’s what it says. . . . [T]he Constitution should keep up to date, but it should keep up to date with the views of the American people. And on these constitutional questions, you’re not going to come up with a right or wrong answer; most of them involve moral sentiments.” Federal News Service, Inc., *Constitutional relevance of foreign court decisions*, C-SPAN (Jan. 13, 2005), <https://www.c-span.org/video/?185122-1/constitutional-relevance-foreign-court-decisions>.

<sup>101</sup> Kahn, *supra* note 97, at 2696.

<sup>102</sup> For example, in *Hopkinson v. Police*, the New Zealand court of appeals had to decide whether setting fire to the country’s flag was a way of dishonoring a national symbol under the Flags, Emblems, and Names Protection Act of 1981 or whether it was protected by the free speech provisions of the New Zealand Bill of Rights Act of 1990. Justice France cited *Texas v. Johnson* to argue that the state’s aims of preserving the flag as a symbol of national unity and the prevention of breaches of the peace were legitimate ones. However, to find if a ban on flag burning was a rational

completely detached from the democratic foundational act of the enactment of the U.S. Constitution are not seen as emerging from the will of “We the People,” and are thus out of line in American constitutional law practice.<sup>103</sup> Attempts to interpret domestic constitutional law in light of comparative or international sources are usually criticized as undemocratic moves.<sup>104</sup> The reluctance to look into foreign and international law prevents U.S. courts from drawing from those transnational dialogues to give substance to the Ninth Amendment and turn it into a useful litigation and adjudication tool.

### III. ARTICLE 33: A PRINCIPLE OF INTERPRETATION

During the first three decades after the sanction of the 1860 Constitution, Argentina’s institutions tried to model those of the United States. The CSJN engaged in constitutional discourse by citing and debating U.S. court decisions, treatises, and legislative practices.<sup>105</sup> Senator and former President Bartolomé Mitre argued openly that “our written law is the Constitution, and our subsidiary law, where we must search to discover the true doctrine, is the case law of the [American] Constitution which we took for a model.”<sup>106</sup>

Despite an early mention of Article 33 in a case that had little to do with unenumerated rights,<sup>107</sup> this provision remained unused

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and proportionate means of advancing those legitimate aims, she turned to a case from Hong Kong in which a similar restriction was upheld on the grounds of special exigencies of public order due to the Hong Kong’s delicate position in relation to China. In the end, she relied on a New Jersey case from 1941 to narrowly interpret the word “dishonor” (in the flag protection statute) to mean “defile” or “vilify.” Given that Hopkinson’s conduct was nothing of the sort, the conviction was reversed. For a brief account of the case, see JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 109-10 (2012).

<sup>103</sup> See Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L. J. 1283, 1327 (2004) (“Th[e] ‘everyone’s doing it’ approach to constitutional interpretation requires explanation and justification. Yet, to date, neither the [Supreme] Court nor the academy has offered a justification that satisfies. Until they do, it seems we are better off to abandon this particular use of foreign and international law.”).

<sup>104</sup> Consider, for example, Justice Scalia’s dissent in *Roper*: “I do not believe that approval by ‘other nations and peoples’ should buttress our commitment to American principles any more than (what should logically follow) disapproval by ‘other nations and peoples’ should weaken that commitment. [...] Foreign sources are cited today, *not* to underscore our ‘fidelity’ to the Constitution, our ‘pride in its origins,’ and ‘our own [American] heritage.’ To the contrary, they are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources ‘affirm,’ rather than repudiate, is the Justice’s own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.” *Roper v. Simmons*, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting).

<sup>105</sup> See Miller, *supra* note 28, at 1544.

<sup>106</sup> Congreso Nacional, Cámara de Senadores, Diario de sesiones de 1869, Sess. of Sept. 11, 1869, at 691 (statement of Senator Mitre), *quoted in* Miller, *supra* note 28, at 1545.

<sup>107</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 12/05/1865, “Don Domingo Mendoza y hermano c. Provincia de San Luis s/ derechos de exportación,” Fallos (1865-3-131) (Arg.). The issue was whether the Province of San Luis could tax goods that were manufactured in its territory to be later transported out of the province. The Court referred to Article 33 and then Article 104 (now Article 121, which states that “[t]he provinces reserve to themselves all the powers not delegated to the Federal Government by this Constitution, as well as those powers expressly reserved to themselves by special pacts at the time of their incorporation”) but relied on the constitutional provisions prohibiting provinces from

during this period. Up until the 1920s, the CSJN seemed to follow in the footsteps of its American counterpart. Surprisingly, the CSJN cited Article 33 regularly throughout the rest of the twentieth century and continues to do so today. The attitude of Argentine judges towards Article 33—which so sharply contrasts with U.S. courts’ sentiments regarding the Ninth Amendment—can be explained by three main factors. The first relates to civil law’s scientific methodology in Argentina; the second is linked to the openness of the Argentine legal system to foreign and international law influences; and the third one concerns the wording of Article 33.

### *A. The Civil Law Tradition*

Argentine legal culture quickly fell victim to nineteenth-century European rationalism,<sup>108</sup> of which codification was its most advanced and popular technique.<sup>109</sup> Drafting a legal code entails an extraordinary effort to foresee and legislate all possible human interactions<sup>110</sup> in a methodical fashion. The emphasis on systematizing that such a project places encourages a perception of legal practice as a scientific endeavor.<sup>111</sup> Indeed, Argentine legal scholar and politician José María Moreno claimed that “[Argentine] private law, especially . . . civil law, is essentially scientific, a true product of science, and founded in doctrine . . . .”<sup>112</sup> Mitre, who appointed Argentine legal scholar Vélez Sarsfield to single-handedly draft a Civil Code for Argentina, argued that since the code was a work of science, the Argentine Congress had no choice but to accept it as a whole without any deliberation.<sup>113</sup>

Codification makes profound changes in the legal culture of a country. Law becomes a matter of applying the right rules, not crafting creative arguments, so lawyers see themselves as technicians, as “operator[s] of a machine designed and built by others.”<sup>114</sup> Legal scholarship becomes “pure and abstract, relatively unconcerned with the solution of concrete social problems or with the operation of legal institutions” since its main goal is to “build a theory

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imposing imposts or duties on imports and exports to hold San Luis’ legislation unconstitutional. *Id.* at 136-37.

<sup>108</sup> VÍCTOR TAU ANZOÁTEGUI, *LAS IDEAS JURÍDICAS EN LA ARGENTINA (SIGLOS XIX-XX)* 17-18 (Editorial Emilio Perrot, 1977).

<sup>109</sup> Rationalism is the philosophical belief that human reason is the sole source of knowledge. *Id.* at 23. “Natural law as it was understood by the philosophers and lawyers of the Enlightenment [that is, as the law of human reason] gave impetus to the codification . . . of legal systems, particularly as they affected private relations.” Horst Klaus Lücke, *The European Natural Law Codes: The Age Of Reason And The Powers Of Government*, 31 U. OF QUEENSLAND L. J. 7, 7 (2012).

<sup>110</sup> For example, a civil code covers private law relating to contracts, torts, family relationships, and property. *Id.* at 11 n.28.

<sup>111</sup> See Gunther A. Weiss, *The Enchantment of Codification in the Common-Law World*, 25 YALE J. INT’L L. 435, 452 (2000).

<sup>112</sup> José María Moreno, *Introduction to LUIS V. VARELA, I CONCORDANCIAS Y FUNDAMENTOS DEL CÓDIGO CIVIL ARGENTINO I*, IV (1873).

<sup>113</sup> Congreso Nacional, *Diario de sesiones de la Cámara de Senadores*, Session of Sept. 25, 1869, at 825 (statement of Senator Mitre), quoted in Jonathan Miller, *Judicial Review and Constitutional Stability: A Sociology of the U.S. Model and its Collapse in Argentina*, 21 HASTINGS INT’L & COMP. L. REV. 77, 106 (1997) (“Congress has entrusted the drafting of the civil code to men of science because it is a scientific operation.”).

<sup>114</sup> John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STAN. L. REV. 859, 866 (1975).



or science of law.”<sup>115</sup> But how do courts cope with unforeseen circumstances of fact? Given the very little weight precedents have in the civil law tradition, they rely on legal scholarly work and general principles.<sup>116</sup>

Civil law methodology ended up permeating public law. Constitutional law issues are also settled by reference to the work of commentators on the Constitution or general principles. As Argentine legal scholar Rafael Bielsa said:

The study of constitutional law much like any law, public or private, requires a method that is determined by the type of discipline[.] . . . This method must be *juridical*, that is, an *inductive* and *deductive* method; the inductive one is undoubtedly essential, since it is through it that *principles* are established.”<sup>117</sup> The Constitution is thought to contain both rules and principles, the latter being “fundamental propositions that dominate over other provisions, not only from the Constitution but from the entire legislative system (private and public laws).”<sup>118</sup>

If law (private or public) is a scientific activity, then lawyers and courts do not have to deal with the democratic objections that arise in the United States when a party or a group argues in favor of a right not explicitly mentioned in the text of the Constitution. Argentina had indeed its foundational act of adopting a Constitution in 1853/60, but the content of the document is not determined by what the Drafters intended or the public meaning of the provisions they enacted. The gaps and penumbras in the Argentine constitutional text are sorted out via scholarly work or scientific principled reasoning.<sup>119</sup>

This encourages Argentine courts to use open-ended sources like Article 33. If what lawyers and judges are doing is “legal science,”<sup>120</sup>

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<sup>115</sup> *Id.* at 867.

<sup>116</sup> According to Merryman and Pérez-Perdomo, this is how legal science is done in civil law: “[t]he scholar takes the raw materials of the law and, by an inductive process sometimes called logical expansion, reasons to higher levels and broader principles. These principles . . . reveal on further study the even broader principles of which they are only specific representations, and so on up the scale. The principles derived by logical expansion are, at one level, the ‘provisions that regulate similar cases or analogous matters’ and, at a higher level, the ‘general principles of the legal order of the state’ that judges should employ in dealing with the problem of lacunae in the interpretation of statutes.” See JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 66 (4th ed. 2018). Argentine practitioners then consult legal scholars’ work for these interpretations or even carry out the abstraction exercise themselves.

<sup>117</sup> RAFAEL BIELSA, *DERECHO CONSTITUCIONAL* 43 (2d ed. 1954).

<sup>118</sup> *Id.* at 44.

<sup>119</sup> See, e.g., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/11/1929, “Comité Radical Acción c/ Resolución del Jefe de Policía de la Capital Federal s/ derecho de reunión,” Fallos (1929-156-81) (Arg.), at 91. The Court not only recognized a right to peacefully assemble using general principles, but reinforced the reasoning by citing public law scholars: “in fact, the right to assemble is not a specific right: it is no other thing, says Dicey, than a consequence of the way in which individual liberty and freedom of speech are conceived . . . Smein, p. 578.” For a more detailed comment on the case, see *infra* p. 40.

<sup>120</sup> A key difference between the scientific approach of the civil law tradition in Argentina and Langdellian legal science needs to be stressed at this point. As I argued in Part III.a., Langdell’s case method sought to train students in scientific legal thinking, that is, in extracting rules of law from precedents in an axiomatic fashion. In the U.S. legal system, precedents are lawyers’ only tool to make a case. This analytical methodology makes it impossible for Ninth Amendment jurisprudence to emerge, as the provision requires drawing rights directly from natural law. The Argentine way of doing legal science is quite different. Prior judicial decisions do not

using the unenumerated rights provision does not raise counter-majoritarian concerns (because legal practice overall is detached from democratic considerations). Article 33 can be coupled with legal scholars' work and/or general principles to make the case that an alleged right had existed all along, even if the Constitution did not explicitly protect it.

### ***B. The Openness to Foreign and International Law***

The scientific nature of legal practice in Argentina makes the Argentine legal system more porous to external sources than the American one; it opens the door to any sound argument made elsewhere. In fact, Argentine judges have traditionally looked to foreign and international practice for inspiration when applying domestic law.

During the first thirty years after the Constitution's enactment, a good domestic constitutional position was one that could be backed by U.S. practice.<sup>121</sup> Although this approach lost momentum during the late 1890s, Argentine courts continued to rely on American precedents (but no longer considered them binding).<sup>122</sup> Between the end of the nineteenth century and most of the twentieth century, the CSJN also cited—though not very often—customary international law.<sup>123</sup> By the mid-1980s, the use by Argentine courts of foreign authorities (other than U.S. practice) and international materials had become more frequent.<sup>124</sup>

In the early 1990s, international law began to play a more influential role in judicial decision-making.<sup>125</sup> But the practice of

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play a crucial role in the Argentine legal system because there is no principle of *stare decisis* (at least in the strict sense of the term). Practitioners claim to be “faithfully” applying the Civil Code or the Constitution (or whatever law controls the matter); instead of drawing from a controlling precedent grounded in a principle that can be expanded to cover the novel case, they consult the work of legal scholars who have “discovered” or “clarified” existing yet “hidden” law, and classified it into an orderly scheme of legal concepts and principles. Legal practice resembles not geometry, but the natural sciences (like biology or physics). See MERRYMAN & PÉREZ-PERDOMO, *supra* note 116, at 64-65 (explaining how legal scientists in civil law countries tried to emulate natural scientists).

<sup>121</sup> See Miller, *supra* note 28, at 1546.

<sup>122</sup> *Id.*

<sup>123</sup> The Court relied on international custom to rule in cases concerning immunities of foreign state officials, the President's war powers, foreigners' right to exit the country during a time of war and foreign prisoners' right to be granted asylum. See Mónica Pinto & Nahuel Maisley, *From Affirmative Avoidance to Soaring Alignment: The Engagement of Argentina's Supreme Court with International Law 3* (Int'l L. Ass'n., Study Grp. on Principles on the Engagement of Domestic Cts. with Int'l L.),

[https://www.academia.edu/20225843/From\\_Affirmative\\_Avoidance\\_to\\_Soaring\\_Alignment\\_The\\_Engagement\\_of\\_Argentina\\_s\\_Supreme\\_Court\\_with\\_International\\_Law](https://www.academia.edu/20225843/From_Affirmative_Avoidance_to_Soaring_Alignment_The_Engagement_of_Argentina_s_Supreme_Court_with_International_Law).

<sup>124</sup> See Martín Böhmer, *The Use of Foreign Law as a Strategy to Build Constitutional and Democratic Authority*, 77 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PUERTO RICO 411, 430 (2008) (“During crucial moments of its history, Argentina looked to foreign Law in order to force the dialogue that its institutions could not produce on their own. After the massive violation of rights in the 1970s and the permanent impossibility of building democracy for more than a hundred years, Argentina looked once more into other legislations and judicial decisions . . .”).

<sup>125</sup> See, e.g., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 07/07/1992, “Recurso de hecho deducido por Miguel Angel Ekmekdjian en la causa Miguel Angel Ekmekdjian c/ Sofovich, Gerardo y otros,” Fallos (1992-315-1492) (Arg.). Ekmekdjian, deeply offended by comments made about Jesus Christ and the Virgin Mary in a television show, filed a suit to enforce his

extensively citing international sources peaked after the 1994 constitutional reform when nine treaties and two declarations on human rights were incorporated into the Constitution and given the same status as its provisions (Article 75 Subsection 22).<sup>126</sup> International law was vindicated as “the supreme law of the land” and soon, arguments of constitutional law and international human rights law became indistinguishable from each other. During this era of “soaring alignment” with international law, the CSJN held that international treaties could override domestic law, provided constitutional foundations to the previously held position regarding customary international law, and “[gave] unprecedented consideration to the decisions of international courts and tribunals, and even to those of other international organs.”<sup>127</sup>

Scientific legal discourse provides Argentine judges with tools to easily dismiss potential contradictions between the text of the Constitution and what incorporated international human rights law instruments demand.<sup>128</sup> If an interpretative doubt arises regarding the meaning or scope of a provision included in any of those legal instruments, their respective interpretative bodies are considered the authority on the matter, and their documents are deemed authoritative sources of law.<sup>129</sup> In fact, when—as in Argentina—practitioners believe they are engaging in a scientific activity, they look for universally valid positions, so they cannot rule out arguments because of their pedigree. Even foreign constitutional courts of other countries can be cited to make one’s case.<sup>130</sup> Giving substance to the

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right of reply contained in Article 14 of the American Convention on Human Rights, a treaty ratified by Argentina in 1984. The Court first stated that, pursuant to Article 31 of the Argentine Constitution (Supremacy Clause), treaties were the supreme law of the land. *Id.* at 1511. Then, in dicta, held that international law (treaties) prevailed over domestic law (citing Article 27 of the Vienna Convention on the Law of Treaties). *Id.* at 1512. Relying on the Inter-American Court of Human Rights’ Advisory Opinion No. OC-7-86, the Court concluded that Article 14 of the American Convention was a self-executing provision and granted Ekmekdjian’s request. *Id.* at 1513-15.

<sup>126</sup> Article 75 also left the door open to the incorporation (with constitutional status) of other international human rights treaties in the future. After the 1994 constitutional reform, three (up to September 2023) other treaties were added to the list. Art. 75, Sec 22, Constitución Nacional [Const. Nac.] (Arg.) translated in [constituteproject.org](https://www.constituteproject.org/constitution/Argentina_1994#s187) by Jonathan M. Miller and Fang-Lian Liao [https://www.constituteproject.org/constitution/Argentina\\_1994#s187](https://www.constituteproject.org/constitution/Argentina_1994#s187).

<sup>127</sup> Pinto & Maisley, *supra* note 123, at 5.

<sup>128</sup> *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 26/12/1996, “Monges, Analía M. c/ U.B.A. –resol. 2314/95–,” Fallos (1996-319-3148) (Arg.). The case concerned an alleged incompatibility between an article of the Argentine Constitution and a provision of the International Covenant on Economic, Social and Cultural Rights, which has constitutional status. The Court argued that “. . . the members of the Constitutional Convention . . . had compared the treaties [incorporated in 1994] and the constitutional provisions and verified that there is no derogation whatsoever, a judgment that the constituted powers cannot ignore or contradict.” *Id.* at 3158. Of course, there was no evidence that such judgment had ever been made, but an interpretation that could harmonize both texts was simply required by reason. The opposite (that treaties given constitutional status could derogate part of the Constitution) “would be a contradiction in terms that could not be attributed to the members of the Constitutional Convention, whose lack of foresight cannot be presumed.” *Id.* at 3159.

<sup>129</sup> *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 07/04/1995, “Recurso de hecho deducido por Osvaldo Iuspa (defensor oficial) en la causa Giroldi, Horacio David y otro s/ recurso de casación –causa N° 32/93–,” Fallos (1995-318-514) (Arg.), at 530.

<sup>130</sup> *See, e.g.*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/11/2011, “Pellicori, Liliana Silvia c/ Colegio Público de

unenumerated rights provision becomes a quite simple task for judges: they can see if a certain right or guarantee was recognized in another legal system and use the open-ended source as a vehicle to import that interpretation into their own. Argentine courts' proneness to external sources accounts for the use of an open-ended provision like Article 33 that serves as a conduit for arguments made abroad to recognize unenumerated rights and guarantees.

### C. *Wording Changes*

Another reason why Argentine judges have used the unenumerated rights provision more than U.S. judges relates to the wording of Article 33. As the comparative law literature has noted, a legal transplant<sup>131</sup> can often be modified in the process of transfer from the country of origin to the country of destination.<sup>132</sup> Although we can trace a reference to the Ninth Amendment in the Argentine constitutional debates, the text of Article 33 differs slightly from that of its American counterpart. First, it covers not only unenumerated rights, but also "guarantees" (procedural remedies); second, and more importantly, it reveals the source from which those unenumerated rights and guarantees should be drawn: they both "[arise] from the principle of sovereignty of the people and from the republican form of government."<sup>133</sup>

If "[e]ven mere translation can increase the differences between the original [rule] and its new incarnation, [and] can cause

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Abogados de la Capital Federal s/ amparo," Fallos (2011-334-1387) (Arg.). The case concerned a worker who sued her former employer on the grounds that her firing had been discriminatory. The Court of Appeals had dismissed the plaintiff's claim because it considered she was not able to prove the employer's discriminatory intent, but the CSJN reversed the decision. Like its U.S. counterpart had similarly done almost forty years before in *McDonnell Douglas Corp. v. Green*, 411 US 792 (1973), the CSJN decided to shift the burden of proof and make the plaintiff carry the initial burden of establishing a prima facie case of discrimination, and then shift the burden back to the employer to articulate a legitimate and nondiscriminatory reason for firing the plaintiff. *Id.* at 1394. To argue that the decision was not a violation of the employer's right to equal protection and due process of law, the CSJN cited similar decisions reached by many other international and foreign courts and bodies: the Committee on the Elimination of Racial Discrimination; the Committee on Economic, Social and Cultural Rights; the Human Rights Committee; the Committee on the Elimination of Discrimination against Women; the International Work Organization; the Council of Europe; the Constitutional Tribunal of Spain; the Constitutional Court of Belgium; the English House of Lords; the European Committee on Social Rights; and the European Court of Human Rights. *Id.* at 1395-1404.

<sup>131</sup> Legal transplantation can be defined as "the moving of a rule or a system of law from one country to another, or from one people to another." ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 21 (2d ed. 1993). "'Borrowing' is the analogous metaphor used to capture the phenomena of constitutional transplants." Vlad Perju, *Constitutional Transplants, Borrowing, and Migrations* 6 (B.C. L. Sch. Faculty Papers, Paper No. 360, 2012), <http://lawdigitalcommons.bc.edu/lfp/360>.

<sup>132</sup> See Jörg Fedtke, *Legal Transplants*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 434, 435 (Jan M. Smits ed., 2006); see also Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. INT'L L. 163, 177 (2003).

<sup>133</sup> The reason behind these two particular changes is not clear. The second one might have been an attempt to protect the unenumerated rights and guarantees of "the people" as a "collective entity" (as opposed to individual rights). See Laura Clérico, *Los derechos no enumerados*, in *CONSTITUCIÓN DE LA NACIÓN ARGENTINA Y NORMAS COMPLEMENTARIAS. ANÁLISIS DOCTRINAL Y JURISPRUDENCIAL* 1222, 1228 (Daniel Alberto Sabsay & Pablo Luis Manili eds., 2009) (explaining that while there was consensus among the drafters about the existence of unenumerated rights and guarantees, there was a dispute over who was the subject of said rights and guarantees).

considerable interpretative . . . difficulties in practice,”<sup>134</sup> it may well be that the additions made by the drafters of the Argentine Constitution have contributed to the markedly different trajectory of Article 33. Judges are likely to feel more comfortable recognizing unenumerated guarantees when the text of the provision directly invites them to do so. Besides, finding unenumerated rights becomes easier when the search field is reduced from the nebulous concept of natural law to the more defined notions of popular sovereignty and republican government. Political theory provides a structured framework with evolving models; it offers a more tangible grounding and allows judges to recognize rights (and guarantees) not within the text of the Constitution or to expand enumerated ones in order to fit current understandings of what a republican form of government requires.<sup>135</sup>

#### D. Article 33 Cases

The CSJN has cited Article 33 in many different contexts and in cases of a very different nature. In some instances, it was used to extend the scope of an enumerated right. In others, it was cited as a justification to create guarantees without which, it argued, enumerated rights could not be exercised properly. The Court has also adjudicated rights without any textual basis because they were “implicitly necessary” to exercise other rights that were indeed enumerated. Some illustrative cases are presented below.

*The right to assemble.* In 1929, the CSJN decided *Comité Radical Acción*. A group of people had asked the Chief of Police for a permit to assemble in public, but the petition was denied because the location chosen was too central, so it would disrupt the traffic. The Court reaffirmed the denial on the merits but given the lack of textual basis, gave careful consideration to the plaintiffs’ argument concerning their “right to assemble”. Invoking Article 33 principles and expanding the scope of Article 14 (“right to petition to authorities”) of Argentina’s Constitution, the Court argued:

[E]ven though the Constitution does not contain a provision or text directly affirming a right of the citizens or inhabitants to assemble peacefully, the existence of such a right flows not only from . . . unenumerated rights and guarantees . . . rooted in the principle of popular sovereignty and the republican form of government (Article 33), but also from the right to petition to authorities (Article 14), which incorporates the traits of the right to assemble peacefully when the petition is done collectively . . .<sup>136</sup>

In *Arjones* (1941), faced with a similar situation, the Court ordered the Chief of Police to issue the permit, and construed a right to assemble from all other civil rights enumerated in Article 14:

[A]lthough the right to assemble is not enumerated in Article 14 of the National Constitution, its existence arises from the sovereignty of the people and the republican form of government, and is thus implicit under Article 33. The right to assemble has its origin in individual liberty, in freedom of speech, in freedom of association. It is

<sup>134</sup> Jörg Fedtke, *Constitutional Transplants: Returning to the Garden*, in 61 CURRENT LEGAL PROBLEMS 49, 51 (Jane Holder & Colm O’Cinneide, eds., 2008).

<sup>135</sup> See Laura Clérico, *supra* note 133, at 1229-30, 1261.

<sup>136</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/11/1929, “Comité Radical Acción c/ Resolución del Jefe de Policía de la Capital Federal s/ derecho de reunión,” Fallos (1929-156-81) (Arg.), at 91.

inconceivable how these rights could be exercised . . . , without the freedom to assemble . . . , to teach or learn, to disseminate one's ideas, to petition to authorities, to orient public opinion and to pursue other lawful ends.<sup>137</sup>

Through the decades, the Court held to this expansive interpretation of Article 14 by way of Article 33 to recognize freedom of assembly as a constitutional right.<sup>138</sup>

*Procedural remedies.* One of the most famous CSJN cases is *Kot* (1958), which gave birth to the writ of *amparo*.<sup>139</sup> A clothing factory owner was prevented from accessing his property due to a labor strike and organized sit-in. Since there was no procedural remedy at that time<sup>140</sup> that could put an end to this problem quickly enough, his lawsuit was filed as a writ of *habeas corpus*, even though he obviously did not claim an illegal detention, but a violation of his right to engage in productive activity and his property rights.<sup>141</sup> The Court had decided a similar case the year before concerning the shutdown of a newspaper by the local police.<sup>142</sup> In that instance, it argued for the first time that, when constitutional rights are being infringed, the lack of a proper procedural remedy is no excuse not to grant expedient relief: "Individual guarantees exist by the sole reason of being enshrined in the Constitution and regardless of regulatory laws."<sup>143</sup> In *Kot*, the Court reiterated this argument and added Article 33 as a justification to grant the writ of *amparo* against an act of a private party:

Having established that there is a tacit or implicit guarantee that protects different aspects of personal liberty (Art. 33 of the National Constitution), no reservation can be made to exclude in an absolute and *a priori* manner restrictions by private parties.

It is plausible to think that, in the spirit of the 1853 drafters, constitutional guarantees had as their immediate aim the protection of essential rights of the individual against the

<sup>137</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 18/12/1941, "Arjones, Armando y otros," Fallos (1941-191-197) (Arg.), at 203.

<sup>138</sup> See, e.g., Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/05/1943, "Asoc. Constitución y Libertad Argentina," Fallos (1943-195-439) (Arg.); CSJN, 07/04/1947, "Recurso de hecho deducido en los autos Campaña Popular en Defensa de ley 1420, apela resolución Jefe de la Policía Federal," Fallos (1947-207-251) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 22/04/1987, "Recurso de hecho deducido por Antonio Jesús Ríos en la causa Ríos, Antonio Jesús s/ oficialización candidatura Diputado Nacional - Distrito Corrientes," Fallos (1987-310-819) (Arg.).

<sup>139</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, "Kot, S. S.R.L. s/ recurso de hábeas corpus," Fallos (1958-241-291) (Arg.).

<sup>140</sup> The 1853/60 Argentine Constitution did not include the writ of *amparo*. Although some provincial constitutions had recognized this procedural remedy during the first half of the twentieth century, it was not until 1966 that it was incorporated under federal law. Law no. 16,986 established its admissibility against acts or omissions by public authorities. In 1968, the Civil and Commercial Procedural Code of the Nation approved its use to protect violations of rights by private individuals. The writ of *amparo* was finally recognized under Article 43 (1st and 2d paragraphs) of the Argentine Constitution after the 1994 constitutional reform. See GERMÁN J. BIDART CAMPOS, II MANUAL DE LA CONSTITUCIÓN REFORMADA 372-74 (2d reprt. 1997).

<sup>141</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, "Kot, S. S.R.L. s/ recurso de hábeas corpus," Fallos (1958-241-291) (Arg.), at 298.

<sup>142</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/12/1957, "Siri, Ángel s/ interpone recurso de hábeas corpus," Fallos (1957-239-459) (Arg.).

<sup>143</sup> *Id.* at 463.

excesses of public authority . . . But the drafters had the sagacity and prudence not to fix exclusively in the text their concrete and historical fears.<sup>144</sup>

The CSJN has also cited Article 33 to expand the scope of guarantees in criminal proceedings, all of which, at their core, are controlled by Article 18 of the Argentine Constitution. It recognized an implicit guarantee to be tried by an impartial judge,<sup>145</sup> a right to counsel,<sup>146</sup> and a right to recuse a criminal judge.<sup>147</sup> It justified granting standing as well: the Court stated that acting as a “citizen” is enough to prove a direct interest in a case when there is a violation of a constitutional provision that amounts to the essence of the republican form of government.<sup>148</sup>

Liberty. Article 19 of the Argentine Constitution has been regarded as the embodiment of the core tenet of classical political liberalism:

The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.<sup>149</sup>

This article enshrines an autonomy principle from which the CSJN, with the help of Article 33, has pivoted to recognize other unenumerated rights linked with personal liberty. For example, in *Ponzetti de Balbín* (1984),<sup>150</sup> Justice Petracchi, in a concurring opinion, borrowed from Justice Cardozo the idea that the Constitution contains an “ordered scheme of liberties”<sup>151</sup> to conclude that it must

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<sup>144</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 05/09/1958, “Kot, S. S.R.L. s/ recurso de hábeas corpus,” Fallos (1958-241-291) (Arg.), at 299.

<sup>145</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 23/12/2004, “Recurso de hecho deducido por el fiscal general de la Cámara Nacional de Casación Penal en la causa Quiroga, Edgardo Oscar s/ causa N° 4302,” Fallos (2004-327-5863) (Arg.)

<sup>146</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/09/1987, “López, Osvaldo Antonio (ex Cabo Primero) s/ asociación ilícita, revelación de secretos concernientes a la seguridad nacional y deserción simple,” Fallos (1987-310-1797) (Arg.).

<sup>147</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 17/05/2005, “Recurso de hecho deducido por el defensor oficial de Horacio Luis Llerena en la causa Llerena, Horacio Luis s/ abuso de armas y lesiones - arts. 104 y 89 del Código Penal –causa N° 3221–,” Fallos (2005-328-1491) (Arg.).

<sup>148</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/04/2015, “Recurso de hecho deducido por la demandada en la causa Colegio de Abogados de Tucumán c/ Honorable Convención Constituyente de Tucumán y otro,” Fallos (2015-338-249) (Arg.).

<sup>149</sup> Art. 19, Constitución Nacional [Const. Nac.] (Arg.).

<sup>150</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1984, “Ponzetti de Balbín, Indalia c/ Editorial Atlántida S.A. s/ daños y perjuicios,” Fallos (1984-306-1892) (Arg.). The case concerned the publication in a magazine of a photograph of a renowned political figure (Ricardo Balbín) while lying in agony in an intensive care unit. The Court rejected the magazine’s freedom of the press arguments and held that the publication lacked public interest and constituted a violation of Balbín’s right to privacy. *Id.* at 1908.

<sup>151</sup> Justice Cardozo, writing for the U.S. Supreme Court in a case concerning the application to the states of the Double Jeopardy Clause of the Fifth Amendment, held that some rights are “of the very essence of a scheme of ordered liberty” or “implicit” in this concept, and thus valid against the states through the Fourteenth Amendment. *See Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937). The Court did not find the right to protection from double jeopardy as one of these. *Id.* at 328. This decision was later overruled in *Benton v. Maryland* 395 U.S. 784 (1969).

necessarily include a right to privacy.<sup>152</sup> Article 33 and Article 19, he argued, are two cornerstones of this scheme.<sup>153</sup>

Two years later, the Court extended this reasoning to declare a right to remarry in *Sejean* (1986).<sup>154</sup> Quoting Article 33, it stated that the Constitution “does not mention all the rights it safeguards” and included human dignity among those rights protected by the unenumerated rights provision.<sup>155</sup> The Court then explained that human dignity encompasses the satisfaction of human needs “in such a way that they may lead to personal fulfillment.”<sup>156</sup> Because “marriage, as a legal institution, recognizes basic human needs, like that of satisfying [our] sexuality through a lasting relationship, with a view to constituting a family,”<sup>157</sup> the Court concluded that denying divorcees the possibility of remarrying affected their right to privacy under Article 19.<sup>158</sup>

*The right to access public information.* Having no textual support from any constitutional provision, the right of the people to access information produced, obtained, transformed, controlled, or kept by the government can only be grounded in the principle of the republican form of government.<sup>159</sup> Madison, ahead of his time, saw this very clearly:

A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives.<sup>160</sup>

In *ADC c/ EN - PAMI* (2012),<sup>161</sup> the CSJN derived the right to access public information from Article 33 in conjunction with Articles 1 (adoption of the federal, republican, representative form of government), 14 (right to free speech), and 16 (right to equal protection),<sup>162</sup> as well as international human rights instruments—incorporated into the Constitution through Article 75 Subsection 22—that protect freedom of expression.<sup>163</sup> The Court held that the

<sup>152</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 11/12/1984, “Ponzetti de Balbín, Indalia c/ Editorial Atlántida S.A. s/ daños y perjuicios,” Fallos (1984-306-1892) (Arg.), at 1938-40 (Petracchi, J., concurring).

<sup>153</sup> *Id.*

<sup>154</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 27/11/1986, “Sejean, Juan Bautista c/ Zaks de Sejean, Ana María s/ inconstitucionalidad del art. 64 de la ley 2393,” Fallos (1986-308-2268) (Arg.).

<sup>155</sup> *Id.* at 2289.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 2290-91. The Court also held that the right to remarry should be recognized because the family (any type of family) enjoys constitutional protection under Article 14, and because the new couples and their children would otherwise be forced to “bear the mark of that which the law does not recognize” in violation of the right to equal protection (Article 16). *Id.*

<sup>159</sup> Estela B. Sacristán, *Acceso a la información en poder de una persona pública no estatal*, in *DERECHO CONSTITUCIONAL* 275, 283 (Alberto Dalla Vía ed., 2d ed. 2015).

<sup>160</sup> Letter from Madison to W.T. Berry, (Aug. 4, 1822), in *I THE FOUNDERS’ CONSTITUTION* 690-91 (Phillip B. Kurkland & Ralph Lerner eds., 1987).

<sup>161</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 04/12/2012, “Asociación Derechos Civiles c/ EN-PAMI - (dto. 1172/03) s/ amparo ley 16.986,” Fallos (2012-335-2393) (Arg.). The case concerned the National Institute of Social Services for Retirees and Pensioners (PAMI)’s refusal to provide an NGO with disaggregated data on the budget spent by the agency on advertising.

<sup>162</sup> *Id.* at 2404.

<sup>163</sup> *Id.* The Court mentioned the American Convention on Human Rights (Article 13) and the International Covenant on Civil and Political Rights (Article 19). It also



disclosure of public information “makes for transparency and the publicity of governmental acts, which are the bases of a democratic society.”<sup>164</sup>

In a couple of other cases, the Court explored the intersection between these concepts and data protection (understood as a fundamental aspect of the right to privacy). In *Urteaga* (1998),<sup>165</sup> the Court ruled on whether a person could file a writ of *habeas data*<sup>166</sup> to access federal records relating to the circumstances of the death of his brother during Argentina’s last military dictatorship.<sup>167</sup> The majority admitted the existence of a right to know the whereabouts of a relative *desaparecido*;<sup>168</sup> Justice Bossert, in a concurring opinion, grounded this right in Article 33:

Among those rights protected by . . . art. 33 . . . there is the right to know the truth about disappeared people with whom family ties exist . . . , since this right arises substantially from the republican principle and the principle of the publicity of governmental acts . . . .<sup>169</sup>

In 1999, the CSJN decided *Ganora*, another case concerning the writ of *habeas data*.<sup>170</sup> Citing *Urteaga*, the majority recognized a right to obtain one’s personal information gathered by law enforcement agencies.<sup>171</sup> Justice Vázquez, in a concurring opinion, went a step further by arguing that Article 43 “establish[es] a mechanism by which all inhabitants can access any information about themselves . . . or their property . . . .”<sup>172</sup> He also stated that “the republican form of government that the Argentine Nation adopted through the constitutional text requires the publicity of its acts . . . .”<sup>173</sup> Although he did not cite Article 33, the influence of the unenumerated rights provision in his reasoning is unquestionable.

## CONCLUSION

This article explored the roots of the unenumerated rights provision contained in the U.S. and Argentine constitutions and dug

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cited Article IV of the American Declaration of the Rights and Duties of Man. *Id.* at 2406.

<sup>164</sup> *Id.* at 2406.

<sup>165</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/10/1998, “*Urteaga, Facundo Raúl c/ Estado Nacional - Estado Mayor Conjunto de las FF.AA. - s/ amparo ley 16.986*,” Fallos (1998-321-2767) (Arg.), at 2781.

<sup>166</sup> In the Argentine legal system, the writ of *habeas data* can be described as a special type of writ of *amparo* that protects information pertaining to the individual and gives the owner of such data the power to decide how and where it can be used. It was incorporated into the Constitution (Article 43, 3d paragraph) after the 1994 constitutional reform.

<sup>167</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/10/1998, “*Urteaga, Facundo Raúl c/ Estado Nacional - Estado Mayor Conjunto de las FF.AA. - s/ amparo ley 16.986*,” Fallos (1998-321-2767) (Arg.).

<sup>168</sup> *Id.* at 2781.

<sup>169</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 15/10/1998, “*Urteaga, Facundo Raúl c/ Estado Nacional - Estado Mayor Conjunto de las FF.AA. - s/ amparo ley 16.986*,” Fallos (1998-321-2767) (Arg.), at 2813 (Bossert, J., concurring).

<sup>170</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/09/1999, “*Ganora, Mario Fernando s/ hábeas corpus*,” Fallos (1999-322-2139) (Arg.).

<sup>171</sup> *Id.* at 2149, 2151.

<sup>172</sup> Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 16/09/1999, “*Ganora, Mario Fernando s/ hábeas corpus*,” Fallos (1999-322-2139) (Arg.), at 2172 (Vázquez, J., concurring).

<sup>173</sup> *Id.* at 2173.

deep into its different treatments by the courts of each country. The explanation revolved around American common law and its relationship with natural law; the commitment of the U.S. to the belief that law is the product of collective self-authorship; Argentine civil law and the use of legal scholarship and general principles; Argentina's interaction with foreign and international law; and the particularities of Argentina's unenumerated rights provision.

At first look, the texts of the Ninth Amendment to the U.S. Constitution and Article 33 of the Constitution of Argentina seem very similar. A superficial reading leaves us thinking about why the approach adopted in judicial decisions has not been the same. Yet a more detailed analysis shows that the Ninth Amendment is understood as a direct source of rights grounded in natural law that was brushed off by positivism and rather conservative interpretive practices. In contrast, Article 33 is considered a principle of interpretation that allows bringing "new" rights and guarantees to the table or expanding the scope of enumerated ones.

The Ninth Amendment requires judges to think in natural law terms, which is hard to do when the legal system they are a part of is committed to a positivist approach to law that resists any claim about the enforceability of universal rights. Legal discourse's fixation with "We the People" does not help the unenumerated rights provision gain traction either.

Article 33 of the Argentine Constitution relies on the notion of republican government, that is, models offered by political theory, which are theoretical frameworks that evolve over time. As concepts of republicanism change, rights and guarantees that are considered inherent to this idea change too, and judges are to reflect these changes when reading the Constitution.

Considering the characteristics of the American legal system as presented in this article, a focus on political theory like that of Argentina's Article 33 might offer the U.S. a way of returning some content to the Ninth Amendment.